

Mascon Rinota Sdn Bhd & Ors v Rinota Construction Sdn Bhd A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-2373-10 OF 2012 B
ZAHARAH IBRAHIM, MOHAMAD ARIFF AND VARGHESE GEORGE, JJCA
30 MARCH 2016 C

Companies and Corporations — Oppression — Purchase of shares of minority shareholder — Whether complaints of minority shareholder/petitioner did not allow for grant of relief under s 181 of the Companies Act 1965 — Whether petitioner's gross delay in filing 'oppression petition' inexcusable and fatal — Whether petitioner could not rely on alleged losses caused to company to seek any remedy for itself as shareholder but had to file derivative action to seek remedy for company or wind-up company on just and equitable grounds D

On the hearing of an 'oppression petition' filed by the respondent pursuant to s 181 of the Companies Act 1965 ('the CA'), the High Court, inter alia, ordered the second, third, fourth, fifth and sixth appellants to jointly and severally buy up the minority shares of the respondent in the first appellant company ('A1') even though the third, fourth, fifth and sixth appellants were not shareholders in A1. A1 was a joint venture company formed between the respondent and the second appellant ('A2') to carry out construction work. A2 held the majority shares in A1. The respondent contended that there was an 'understanding' before A1 was set up, that A2 would secure at least five construction projects for A1. However, after completing two projects, A1, for all intents and purposes, became dormant. One of the respondent's complaints in its 'oppression petition' was that A2 and the other appellants (who were related to A2) had left A1 'to die' by not securing the promised projects for the company. The respondent also contended that because of certain financial/accounting discrepancies, A1's audited accounts did not reflect the true financial state of the company. The instant appeal was against the decision of the High Court. E F G H

Held, allowing the appeal and setting aside the orders of the High Court:

- (1) It was not denied that A1 ceased to be in active construction business from about 1997. There was total inaction on the respondent's part, or on its behalf, to pursue or assert the alleged 'contractual' expectations or the corporate rights to put right what was claimed to have disadvantaged the respondent. The petition was only filed in 2006, some ten years after the matters complained of had first occurred or when it ought to have caused concern to the respondent as a shareholder. The question of delay in filing I

- A the petition was of paramount importance in any consideration of the exercise of the court's discretion under s 181 of the CA (see paras 22–23).
- (2) Acting without expediency to protect or further one's rights when an alleged breach or violation of such right arose amounted to acquiescence, meaning acceptance of or consent to that situation. As at the date the petition was filed, A1, for all intents and purposes, was a dormant entity. The complaints raised by the respondent no longer related to an on-going state of affairs of A1 such as would meet the requirements of s 181(1)(a) of the CA, namely, that the 'affairs of the company are being conducted or the powers of the directors are being exercised ...' in an oppressive manner or in disregard to the interests of the shareholders. On this ground of delay in filing the petition alone, the petition ought not to have been allowed by the High Court (see paras 2(a), 25, 29 & 31).
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- D (3) The respondent's grievances with regard to losses arising from the alleged use of A1's assets or from the non-recovery of monies due to A1 or from improper financial or accounting entries as to such matters (if at all), were wrongs (if at all) that caused 'loss' to A1. Any recovery or correction in the circumstances had to be at the instance of the company or by way of derivative proceedings brought in the name of the company. Based on the 'reflective loss principle', a shareholder could not rely on any imputed diminution in value of the company's shares or likely impairment of profits or lower payment of dividends caused thereby, to seek any remedy independently on his own. The recourses available to the respondent was either to proceed by way of derivative action brought under s 181A of the CA to recover the monies due to A1 and/or effect appropriate corrections to the company's financial statements or to go for outright winding-up of the company on just and equitable grounds (see paras 2(b) & 39).
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- G (4) There was no legal or sustainable basis for the exercise of the court's discretion under s 181 of the CA to have allowed the petition and made the orders as was done in this case for a re-assessment of the company's financial records/state and thereafter for a buy-out of the respondent's shares in A1 by the second, third, fourth, fifth and sixth appellants (see para 40).
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[Bahasa Malaysia summary]

- I Semasa mendengar 'oppression petition' yang difailkan oleh responden menurut s 181 Akta Syarikat 1965 ('AS'), Mahkamah Tinggi, antara lain, memerintahkan perayu-perayu kedua, ketiga, keempat, kelima dan keenam untuk bersesama dan berasingan membeli saham minoriti responden dalam syarikat perayu pertama ('A1') meskipun perayu-perayu ketiga, keempat, kelima dan keenam bukan pemegang saham dalam A1. A1 adalah syarikat usaha sama yang terbentuk antara responden dan perayu kedua ('A2') untuk menjalankan kerja pembinaan. A2 memegang saham majority dalam A1.

Responden berhujah bahawa terdapat 'undertaking' sebelum A1 ditubuhkan, bahawa A2 akan memperoleh sekurang-kurangnya lima projek pembinaan untuk A1. Walau bagaimanapun, selepas menyiapkan dua projek, A1, untuk segala niat dan tujuan, menjadi dormant. Salah satu aduan responden dalam 'oppression petition'nya adalah bahawa A2 dan perayu-perayu lain (yang berkaitan dengan A2) telah meninggalkan A1 'to die' dengan tidak memperoleh projek-projek yang dijanjikan untuk syarikat itu. Responden juga berhujah bahawa oleh kerana pertikaian kewangan/perakaunan tertentu, akaun diaudit A1 tidak menggambarkan keadaan kewangan sebenar syarikat itu. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

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Diputuskan, membenarkan rayuan dan mengetepikan perintah-perintah Mahkamah Tinggi:

- (1) Ia tidak dinafikan bahawa A1 telah berhenti aktif dalam perniagaan pembinaan sejak 1997. Tiada tindakan langsung di pihak responden, atau di pihaknya, untuk meneruskan atau mendesak jangkaan 'contractual' atau hak-hak korporat untuk memperbetulkan apa yang didakwa menjejaskan responden. Petisyen itu hanya difailkan pada 2006, kira-kira sepuluh tahun selepas perkara-perkara yang diadukan sejak ia berlaku atau apabila ia patut telah menyebabkan kerisauan kepada responden sebagai pemegang saham. Persoalan kelewatan dalam memfailkan petisyen adalah amat penting dalam apa-apa pertimbangan berhubung pelaksanaan budi bicara mahkamah di bawah s 181 AS (lihat perenggan 22–23).
- (2) Bertindak tanpa kesegeraan untuk melindungi atau meneruskan hak seseorang apabila pelanggaran atau pertentangan hak sedemikian yang dikatakan membentuk persetujuan, bermaksud penerimaan terhadap atau persetujuan kepada keadaan tersebut. Setakat tarikh petisyen tu difailkan, A1, untuk segala niat dan tujuan, adalah entiti dormant. Aduan-aduan yang ditimbulkan oleh responden tidak lagi berkenaan keadaan urusan A1 yang sedang berterusan yang memenuhi keperluan s 181(1)(a) AS, iaitu, bahawa 'affairs of the company are being conducted or the powers of the directors are being exercised ...' dalam cara menindas atau tidak menghiraukan kepentingan pemegang saham. Atas alasan untuk kelewatan ini dalam memfailkan petisyen itu sahaja, petisyen itu tidak patut dibenarkan oleh Mahkamah Tinggi (lihat perenggan 2(a), 25, 29 & 31).
- (3) Kilanan responden berkenaan kehilangan yang timbul daripada penggunaan aset-aset A1 yang dikatakan itu atau daripada wang yang tidak dijumpai yang kena dibayar kepada A1 atau daripada kemasukan kewangan atau perakaunan yang tidak betul berkenaan perkara-perkara tersebut (jika apa pun), adalah kesalahan (jika apa pun) yang menyebabkan 'loss' kepada A1. Apa-apa penemuan atau pembetulan

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- A dalam keadaan sedemikian hendaklah oleh syarikat itu atau melalui prosiding derivatif. Berdasarkan 'reflective loss principle', pemegang saham tidak boleh bergantung kepada apa-apa pengurangan yang dikenakan dalam nilai saham syarikat atau berkemungkinan menjejaskan keuntungan atau mengurangkan bayaran dividen yang disebabkan oleh
- B itu, untuk memohon apa-apa remedi secara berasingan dengan sendirinya. Remedi yang tersedia untuk responden adalah sama ada untuk meneruskan melalui tindakan derivatif yang dimulakan di bawah s 181A AS untuk mendapat balik wang yang kena dibayar kepada A1 dan/atau melaksanakan pembetulan yang bersesuaian kepada penyata
- C kewangan syarikat atau terus kepada penggulangan syarikat atas alasan adil dan saksama (lihat perenggan 2(b) & 39).
- (4) Tiada asas undang-undang atau yang substansial untuk melaksanakan budi bicara mahkamah di bawah s 181 AS bagi membenarkan petisyen
- D itu dan membuat perintah-perintah itu sepertimana yang telah dilakukan dalam kes ini untuk penilaian semula rekod/keadaan kewangan syarikat dan selepas itu belian saham responden dalam A1 oleh perayu-perayu kedua, ketiga, keempat, kelima dan keenam (lihat perenggan 40).]
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Notes

For a case on purchase of shares of minority shareholder, see 3(1) *Mallal's Digest* (5th Ed, 2015) para 771.

F Cases referred to

Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors [1994] 1 MLJ 520, HC (refd)

Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, HL (refd)

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Kong Thai Sawmill (Miri) Sdn Bhd, Re; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung [1978] 2 MLJ 227, PC (refd)

Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2) [1982] Ch 204, CA (refd)

Scottish Co-Operative Wholesale Society Ltd v Meyer [1959] AC 324, HL (refd)

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Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (refd)

Townsing Henry George v Jenton Overseas Investment Ptd Ltd (in liquidation) [2007] 2 SLR(R) 597, CA (refd)

Legislation referred to

- I Companies Act 1965 ss 181, 181(1)(a), 181(2), 181A, 300, 303, 304, 305, 306
Companies Act (Cap 50) [SG] ss 216, 216(2)(c), 216A

Appeal from: Petition No D7–26–89 of 2006 (High Court, Kuala Lumpur)

Prem Ramachandran (Kumar Partnership) for the appellant.
WSW Davidson (Karen Ng Yueh Ying with him) (Azman Davidson & Co) for the respondent.

Varghese George JCA:

[1] This appeal was against the orders granted by the High Court after the hearing of a petition brought pursuant to s 181 of the Companies Act 1965 ('the CA'), often referred to as an 'oppression petition'. The court had principally ordered a buyout of the petitioner's minority shares in a joint venture company. The terms of the orders issued are reproduced here:

- (a) that the second, fourth, fifth to and seventh respondents jointly and severally purchase the shares owned by the petitioners in the first respondent at such price and terms determined by this honourable court after making all necessary adjustments to the accounts of the company to compensate for the acts and oppression of the respondents;
- (b) that the second and fourth respondents pay, or cause its subsidiaries or associated companies to pay, the first respondent all debts owed to it by the second and fourth respondents or its subsidiaries or associated companies in connection to the lease agreement and loans extended to the undisclosed 'fellow subsidiaries'; (*)
- (c) that a certified public accountant be appointed to inspect the accounts of the first respondent for the period beginning June 1995 to the date of this order, and to report to this honourable court of the results of the inspection; and
- (d) costs arising out of this and occasioned by this petition be borne and paid by the second, fourth to & seventh respondents to the petitioner

(*We were informed that it had been subsequently clarified with the court that the order as per (b) above ought not to have been entered since the petitioner had at the outset of the hearing of the petition abandoned that relief as originally sought.)

[2] After having heard respective counsel we had unanimously allowed the appeal. There were two basic reasons underlying our decision. They were:

- (a) the petition here (commenced in 2006) had not been filed with necessary expedition or promptitude and the complaints raised by the petitioner no longer related to an ongoing state of affairs of the company such as would meet the requirements of s 181(1)(a) of the CA, namely that, the 'affairs of the company *are being conducted* or the powers of directors *are being exercised ...*' in an oppressive manner or in disregard to the interests of the shareholders; and

- A (b) grievances of the petitioner with regard to the losses arising from alleged use of the company's assets or nonrecovery of monies due to the company or improper financial or accounting entries as to such matters (if at all), were wrongs (if at all) that caused 'loss' to the company. Any recovery or correction in the circumstances had to be at the instance of the company
- B or by way of derivative proceedings brought in the name of the company. Based on the 'reflective loss principle' a shareholder could not rely on any imputed diminution in value of the company's shares or likely impairment of profits or lower payment of dividends caused thereby, to seek any remedy independently on his own.
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- [3] The parties will be referred to here as they were at the High Court. The petitioner ('Rinota Construction Sdn Bhd') had originally cited seven parties as respondents to the petition. However subsequently the petitioner discontinued the action against the third respondent ('Yeoh Sek Phin').
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- [4] In this grounds, we have extracted and make reference only to such part of the respective party's story, claims and submissions as we found pertinent for our consideration and decision as aforesaid.
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- [5] It was not in dispute that the petitioner and the second respondent ('Mascon Sdn Bhd') had in early 1995 agreed to carry out construction business through a joint venture company, the first respondent ('Mascon Rinota Sdn Bhd') ('the company'). The issued and paid up capital in the company was held in the following proportions:
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Second respondent: RM300,000 (300,000 shares)

Petitioner: RM200,000 (200,000 shares)

- G The second respondent was intended to be and was the controlling shareholder of the company at all material times.

- H [6] There was however no 'shareholders agreement' or 'joint venture agreement' entered into by the parties. Accordingly the relationship between the shareholders inter se and the operations of the company were solely dictated by the company memorandum and articles of association.

- I [7] One Richard Tankersley ('RT') was the managing director and controlling shareholder of the petitioner.

- [8] The second respondent was a subsidiary of the fourth respondent (Olympia Industries Bhd), a public listed company, which held 71% of the equity in the second respondent. The shareholders of the fourth respondent

included the fifth respondent ('Dato' Yap Yong Seong'), members of his family and other companies allied to the fifth respondent. A

[9] The fifth respondent was never a director of the company and neither of the second respondent. B

[10] The sixth respondent ('Yap Wee Keat') was the son of the fifth respondent. The sixth respondent was a director of the company until his resignation from the board on 6 September 1999. The board of director of the company thereafter comprised of: C

- (a) RT and one Ng Kwee Ying, as nominees of the petitioner; and
- (b) the third respondent as the sole nominee of the second respondent (against whom, as earlier noted, this action had been discontinued). D

Hence the majority of the members on the board of directors of the company post-September 2009 were representatives of the petitioner.

[11] The petitioner's narrative was that RT and the fifth respondent in discussion preceding the setting up of the joint venture business had an 'understanding' that at least five construction projects would be made available to the company, although admittedly the immediate objective was to carry out two projects in Malacca namely: E

- (a) the Casa Lago Condominium project; and F
- (b) the Harbour Club project.

[12] It was further claimed by the petitioner that there was an 'agreement' between the intending shareholders that, RT and the petitioner would be responsible for the construction aspects of the projects on a 'negotiated managing contractor cost plus basis'. G

[13] The petitioner's specific complaints arising from the claimed 'understanding' was twofold, namely: H

- (a) that the further three projects allegedly promised were not secured or awarded to the company; and
- (b) that, even in the case of the Casa Lago and Harbour Club projects, the contracts that were obtained by the company were the result of a competitive tender exercise. I

[14] It was however not in dispute at all, that the Casa Lago and Harbour Club projects had been proceeded with and completed by the company way

- A back *in 1997*. The said projects were for Olympia Land Bhd ('OLB') (not to be confused with the fourth respondent — Olympia Industries Bhd). The final accounts related to the two said projects for OLB were signed of in January 1999.
- B [15] The petitioner did not also dispute that the arrangement between the shareholders has always been that the second respondent would arrange for all financing required by the company to execute the Casa Lago and Harbour Club construction projects. In this regard, the petitioner further conceded that
- C they were made fully aware that advances had been obtained from OLB (and other companies related to the second respondent) and that the petitioner had even agreed that the rate of interest payable on such borrowed funds was to be at 12%pa.
- D It need to be mentioned here that OLB was not a named respondent in this petition.
- E [16] It is also relevant to make a note here that OLB as employer of the Casa Lago and Harbour Club projects had subsequently imposed a claim for liquidated ascertained damages ('LAD') as a result of the late completion of the projects (in the sum of RM500,000) which sum had been adjusted as against monies payable by OLB to the company in respect of those projects.
- F [17] The thrust of the petitioner's contention premised on the matters set out in the preceding paragraphs was that the second respondent as the majority shareholder had failed to honour the 'understanding' and the expectations of the petitioner for a long term collaboration through the joint venture. Counsel for the petitioner's submission in dramatic terms was that the company had
- G however been left 'to die' by the respondents (who were related to the second respondent, the majority shareholder).
- H [18] The other complaints raised by the petitioner included in the main the following:
- I (a) construction equipment, in particular two tower cranes, hoists and scaffoldings, which belonged to the company had been removed from the construction site and subsequently wrongfully disposed of by the second respondent. No commercial rent for the use in the meanwhile of those equipment by the second respondent or value for the same was received by or credited to the company;
- (b) there had been manipulations of the accounts of the company which had been maintained and managed by the second respondent's staff at all times. The value of the company had gone down progressively from a

positive position in 1997 into a negative state by 2004 although the company had no further business activity to post any likely losses;

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- (c) the company had been financially disadvantaged in that rental-rates due for use of the company's machinery and equipment had not been fixed fairly and/or not booked in as income of the company at all. Further, although it had been agreed that lease payments for certain leased-equipment would be taken over and paid by the second respondent and thereafter the beneficial ownership of those leased items would pass to the second respondent, the second respondent had nevertheless raised debit notes for such lease payments as against the company; such debiting had also continued ever after all dues on the lease arrangement had been settled;

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- (d) the second respondent had unilaterally agreed to allow the LAD sum imposed by OLB without consultation or agreement of the petitioner and further this had been offset against the construction cost due from OLB to the company; and

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- (e) although the company had been forced to agree and pay high interest rates on financing obtained from second respondent or its related companies, no interest payment had been similarly imposed on monies due to company from the second respondent or its related companies.

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[19] It is starkly obvious that the gist of the complaints listed out in para 18 was that there were monies recoverable or due to the company and/or that the finances of the company as drawn up did not reflect the true and fair position of the company's financial state resulting from such inadequacies in accounting matters.

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[20] As shown above there were two broad areas that formed the essence of the petitioner's complaints as a minority shareholder, namely:

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- (a) the non-award of further 'negotiated construction contracts' allegedly expected by the company; and
- (b) those financial or accounting discrepancies which arguably meant that the audited annual accounts of the company as drawn up did not reflect the true value of or the proper financial state of the company.

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OUR DELIBERATIONS AND DECISION

[21] We must state at the outset that in our assessment the real issue in this case, even if the truth of those various complaints were established, was whether those facts amounted to 'oppressive' acts or 'conduct in disregard' to the petitioner's interest such as would be sufficient to warrant the granting of any relief under this petition brought under s 181 of the CA. Findings may

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A have been made by the learned judge hearing the petition on some of those issues of fact or there might even have been some admission made by the second respondent, but the basic question remained whether the existence of those facts ipso facto meant that the remedies under s 181 of the CA should be granted to the petitioner as was done here by the High Court.

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[22] It is not denied that the company ceased to be in active construction business from about 1997, that RT remained as a director of the company (and with another nominee of the petitioner even constituted the majority of the board subsequent to 1999), and, save for the limited reservations expressed by RT in 1997 as to the drawing up of the company's annual accounts (but he nevertheless signed the drafts) and a subsequent letter of complaint in 2004, there was total inaction on the part of the petitioner or on its behalf to pursue or assert the alleged 'contractual' expectations or the corporate rights to put right what is claimed to have disadvantaged the petitioner. This petition was only filed in 2006, some ten years after those matters complained of had first occurred or when it ought to have caused concern to the petitioner as a shareholder.

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[23] The question of delay in filing the petition was of paramount importance in any consideration of the exercise of the court's discretion under s 181 of the CA. This issue had been raised by the second respondent's counsel at the High Court but the learned judge, with respect, appears to have overlooked the significance of this lapse in the conduct of the petitioner.

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[24] It is also pertinent to note that the petitioner *qua* shareholder of the company, was seeking for a 'buyout' of the petitioner's shares (albeit after it was revalued) by, not just the other shareholder of the company (the second respondent), but others who were not members of the company. The two principal relief sought were (as per the amended petition):

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(a) An order that the ~~1st Respondent and/or the 2nd Respondent~~ *2nd to 7th Respondents do jointly and severally purchase* the shares owned by the Petitioner in the Company at such price and terms determined by this Honourable Court; after making all necessary adjustments to the accounts of the Company to compensate for the acts and oppression of the Respondents;

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(b) ...

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(c) An order that a certified public accountant be appointed to inspect the accounts of the First Respondent for the period beginning June 1995 to the date of this order, and to report to this Honourable Court of the results of the inspection.

[25] It was trite that relief to be allowed under s 181 of the CA was

discretionary to be determined by the court upon equitable principles, inclusive as of necessity, the conduct of the parties taken in its totality. The petitioner here was also restricting the relief that was being sought to a forced buyout of their shares in the company which, admittedly for all intents and purposes, was a dormant entity as at the date the petition was filed.

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[26] Section 181(1) and (2), in so far as was material for our consideration was in the following terms:

181 Remedy in cases of an oppression.

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- (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground —

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- (a) that the affairs of the company *are being conducted* or the powers of the directors *are being exercised* in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

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- (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed *which unfairly discriminates* against or *is otherwise prejudicial* to one or more of the members or holders of debentures (including himself).

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- (2) If on such application the Court is of the opinion that either of those grounds is established *the Court may*, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may —

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- (a) direct or prohibit any act or cancel or vary any transaction or resolution;
- (b) regulate the conduct of the affairs of the company in future;
- (c) provide for the purchase of the shares or debentures of the company *by other members* or holders of debentures of the company or by the company itself;
- (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
- (e) provide that the company be wound up.

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(Emphasis added.)

[27] In the leading case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai*

- A *Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227, the Privy Council through Lord Wilberforce opined as follows:

B There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part. *Relief cannot be sought under s 181 merely because facts are established which would found a minority shareholders' action*; the section requires (relevantly) 'oppression' or 'disregard' to be shown, and these are not necessary elements in the action referred to. But if a case of 'oppression' or 'disregard' is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action. To the extent that the appellants so contend their Lordships do not accept their argument.

D Secondly, for the case to be brought within s 181(1)(a) at all, the complaint must identify and prove: 'oppression' or 'disregard'. *The mere fact that one or more of those managing the company possess a majority or the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule.* It is only when majority rule passes over into rule oppressive of the minority or in disregard of their interests that the section can be invoked. As was said in a decision upon the United Kingdom section *there must be a visible departure from the standards of fair dealing* and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd* [1967] 1 MLJ 31, at p 35): their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v Drysdale*). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

G *Thirdly, in a number of United Kingdom decisions it has been held that for s 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg in re Jermyn Street Turkish Baths Ltd); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the section (and the same is true of s 181(1)(1)) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of s 181(a)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-s (1)(a) is not particular acts by the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section.*

[28] In *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 the learned judge (in a petition to wind-up the company on just and equitable grounds) held that:

... I noted that the major matters complained about by the petitioners appear to have been spread out over a considerable period of time. It is settled law that *delay by petitioners in initiating proceedings after they have realised that they have been victims of a scheme of oppression will induce the court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complains are not therefore made in good faith* (see *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184).

In the present case, there was inordinate delay in the presentation of the petition sufficient to debar the petitioners from relief by way of an order for winding up.

[29] Acting without expediency to protect or further one's rights when an alleged breach or violation of such right arose amounted to acquiescence, meaning acceptance of or consent to that situation. We found merits therefore in the submission of counsel for the respondents that the court should deny relief to an interested party who had sat on his rights and accepted tacitly such practices or decisions adopted by a company in its business affairs over time, but, who now wished to advance matters related to or arising therefrom as a grievance for relief under s 181 of the CA (see *Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors* [1994] 1 MLJ 520).

[30] The observation of the Court of Appeal in *Re Jermyn Street Turkish Baths* germane to this point is reproduced below:

We are concerned only to consider whether the affairs of the company were, when the petition was presented, being conducted in a manner oppressive to some part of the members of the company. ... Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor. If a director of a company were to draw remuneration to which he was not legally entitled or in excess of the remuneration to which he was legally entitled, this might no doubt found misfeasance proceedings or proceedings for some kind of relief, but it would not of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers to procure or retain the remuneration of to stifle proceedings by the company or other shareholders in relation to it.

[31] There was no evidence in this instant appeal that the petitioner had been constrained in any way by the second respondent or the others cited, from advancing whatever complaints the petitioner might have had either within the company (for example: at board meetings) itself or otherwise, as are now being raised, some ten years later, in this petition seeking a buyout of the petitioner's shares in the company.

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We were of the view that on this ground of delay in filing the petition alone, the petition ought not to have been allowed by the court.

B

[32] Accordingly, the question as to whether there even existed any ‘understanding’ to extend to the company a further three projects, was irrelevant and a non-issue. Further, it did not matter for the fair disposal of the petition, that the fifth and sixth respondents had failed to file any affidavit in response (and be subjected to be cross-examined on such deposition) as submitted by counsel for the petitioner. The ratio of the *Scottish Co-Operative Wholesale Society Ltd v Meyer* [1959] AC 324 case, strenuously relied upon by counsel for the petitioner, was also of no assistance as unlike in that case, there was here no evidence of a complete diversion by the second respondent of the business already secured by the company to the second respondent or its related companies.

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[33] Coming then to the other area of grievance of the petitioner, it was obvious that the substance of those complaints was that, had the financial records of the company been maintained properly, in that, receivables, like certain rental payments, had been properly booked in and if there had been no wrongful debits made or other manipulations done to the company’s accounts by the second respondent or their agents, the company would have shown profits and be in positive territory rather than the negative value-state it was now in. In other words, the argument mounted was that ‘losses’ or ‘damages’ had been caused to the company’s financial position by such omissions or acts, and consequently there had been occasioned a diminution of value in so far as the petitioner’s shares (40%) in the company was concerned.

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[34] In this regard, there is a well-established principle in corporate law that bars a shareholder from directly bringing or relying on ‘losses’ of the company to seek relief for himself unless by way of derivative action, namely proceedings brought in the name of the company. This was known as the ‘reflective loss principle’. The principle applied where the shareholder’s alleged loss was merely a reflection of the company’s loss, such as where the shareholder’s loss is a diminution in the value of his shares as a result of those alleged wrong to the company. In such situations, recovery by the shareholder of the loss he suffered is precluded, as this would mean making the wrongdoer liable for the same wrong twice over.

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[35] This principle that it was the company that prima facie should act to recover any losses caused to it through a derivative action was succinctly captured in the judgment of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2)* [1982] Ch 204 (at p 223–224) in the

following terms:

But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. *The shareholder does not suffer any personal loss. His only 'loss' is through the company*, in the diminution in the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. *The shares themselves, his right of participating, are not directly affected by the wrongdoing*. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company.

[36] This principle was further clarified by the learned author of the revised third edition of *Walter Woon on Company Law* (at p 581) in the following manner:

A difficult issue arising from the above type of cases is that the loss suffered by the minority shareholder is sometimes merely reflective of the loss suffered by the company. *The general rule is that reflective loss is not recoverable, as the company is the proper plaintiff to bring an action against the wrongdoing controllers*. Where no injury apart from injury to the company is shown, it is arguable that the minority shareholder ought to commence a common law derivative action or apply to court under s 216A for leave to bring an action on behalf of the company, instead of proceeding under s 216 to obtain corporate, rather than personal, relief. *Further, even if it is permissible for the minority shareholder to seek corporate relief under s 216, should not the proper order be to allow the minority shareholder to bring civil proceedings in the name of the company against the malfactors under s 216(2)(c), instead of granting relief directly under s 216?*

[37] Section 216 of the Singapore Companies Act is almost similar in terms to our s 181 of the CA. The CA also have provisions which enable a derivative action to be brought by a shareholder in the name of the company, namely, s 181A of the CA (equivalent to s 216A of the Singapore Act). It must be noted however that there is no equivalent provision to s 216(2)(c) of the Singapore Act, in our s 181(2) of the CA. The Singapore provision was as follows:

(c) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;

In the absence of such additional provision in those terms in our CA, a shareholder having such complaints (of loss caused to the company) was limited to seek recourse through a separate derivative action brought pursuant to s 181A of the CA.

- A [38] This position in corporate law was affirmed by the Singapore Court of Appeal in *Townsing Henry George v Jenton Overseas Investment Ptd Ltd (in liquidation)* [2007] 2 SLR(R) 597 (at p 622–625) (although on the facts of that case it was not applied). The judgment made reference to the speech of Lord Millet in the House of Lords' case of *Johnson v Gore Wood & Co (a firm)*
- B [2002] 2 AC 1 as follows:

75. The policy considerations behind the principle of reflective loss are clearly explained by Lord Millet in the following passage from his judgment in *Johnson*, at p 62:

- C The position is, however, different where the company suffers loss caused by the breach of duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. *If the shareholder is allowed to recover in respect such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders.* Neither course can be permitted.
- D This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that is the company which is allowed to recover to the exclusion of the shareholder. (Emphasis added.)
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- [39] The only exception to that rule was where the wrongdoer, by the breach of duty owed to the shareholder, had actually disabled the company from pursuing such course of action. In this case before the court, there was no evidence of any such restraint by the second respondent. The recourse available to the petitioner in such circumstances, in our considered view, was by way of derivative action brought under s 181A of the CA to recover first monies due to the company and/or effect appropriate corrections to the company's financial statements. Another avenue that was open to the petitioner was to go for outright winding-up of the company on just and equitable grounds. In the latter event, the liquidator is empowered to examine the company's account, investigate wrong doings, rectify errors in accounting and even bring needful proceedings against those that had caused the 'losses' to the company, (see ss 300, 303, 304, 305, and 306 of the CA) including recovery action against delinquent officers or shareholders of the company.
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- I [40] For the reasons discussed above there was no legal or sustainable basis, for the exercise of the court's discretion under s 181 of the CA, to allow the petition and make the orders as was done in this case for a reassessment of the company's financial records/state and thereafter for a buyout of the petitioner's shares in the company by the second, fourth, fifth, sixth, and seventh respondents. We were therefore satisfied that this appeal warranted appellate

intervention. We accordingly allowed the appeal with costs and set aside all the orders granted by the High Court. **A**

Appeal allowed and orders of the High Court set aside.

Reported by Ashok Kumar **B**

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